

**STATE OF WISCONSIN**  
**Department of Industry, Labor & Human Relations**

*In the Matter of the PECFA Appeal of*

Vern Dahl  
Open Pantry Food Marts of WI  
817 S. Main St.  
Racine WI 53402

PECFA Claim #53204-3421-05  
Hearing #95-26A

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**Final Decision**

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**PRELIMINARY RECITALS**

Pursuant to a petition for hearing filed November 8, 1994, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on July 31, 1995, at Madison, Wisconsin. A proposed decision was issued on November 22, 1995, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether the department's decision denying reimbursement to the appellant for \$13,434.30 in unitized charges for cleanup costs (at the 605 W. Lapham Blvd. site) was reasonable.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Vern Dahl  
Open Pantry Food Marts of WI 817 S. Main St.  
Racine WI 53402  
By: Charles H. Constantine  
Constantine, Christensen & Krohn, S.C.  
723 Main Street  
P.O. Box 1823  
Racine WI 53401-1823  
Department of Industry, Labor and Human Relations  
201 East Washington Avenue

P.O. Box 7946  
MADISON WI 53707-7946  
By: Kristiane Randal  
Assistant General Counsel  
P.O. Box 7946  
Madison WI 53707-7946

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated February 13, 1996.

The matter now being ready for decision, I hereby issue the following

### **FINAL DECISION**

The Proposed Decision dated November 22, 1995, is hereby adopted as the final decision of the department.

### **NOTICE TO PARTIES**

#### **Request for Rehearing**

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Industry, Labor & Human Relations, Office of Legal Counsel P. O. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes.

#### **Petition For Judicial Review**

Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel 201 E. Washington Avenue, Room 400x, P. O. Box 7946, Madison, WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated and mailed: 3-29-96

Richard C. Wegner  
Department of Industry, Labor & Human Relations  
P O Box 7946  
Madison WI 53707-7946

cc: Parties in Interest and counsel

**STATE OF WISCONSIN  
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS**

**IN THE MATTER OF: The claim for  
Reimbursement under the PECFA  
Program by** Madison, WI 53707-7975  
Telephone: (608)242-4818

MADISON HEARING OFFICE  
1801 Aberg Ave., Suite A  
P.O. Box 7975

Telephone: (608) 242-4813  
Fax: (608)242-4813

Vern Dahl  
Open Pantry Food Marts  
817 S. Main St.  
Racine, WI 53403

Appellant,

vs.

PECFA CLAIM # 53204-3421-05

Secretary, Wisconsin Department of  
Industry, Labor and Human Relations

Hearing Number: 95-26A

Respondent

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**PROPOSED DECISION**

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**NOTICE OF RIGHTS**

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Richard C. Wegner, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter.

**STATE HEARING EXAMINER:**

Ronald I. Weisbrod

**DATED AND MAILED:**

November 22, 1995

**MAILED TO:**

**Appellant Agent or Attorney**

Attorney Charles H. Constantine  
Constantine, Christensen  
& Krohn, S. C.  
723 Main Street,  
P.O. Box 1823  
Racine, WI 53401-1823

**Department of Industry, Labor  
and Human Relations**

Joyce Howe  
PECFA Disputed Claims  
P.O. Box 7946  
Madison, WI 53707-7946

PRELIMINARY RECITALS

Pursuant to a petition filed on November 8, 1994, under Section 101.02(6) (e), Wis. Stats., and Section ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on July 31, 1995, at Madison, Wisconsin, before Ronald I. Weisbrod, administrative law judge, acting as a Hearing Examiner.

The issues for determination are:

A. Whether the department's decision to deny the appellant's request for reimbursement under the PECFA program for cleanup costs at its 605 W. Lapham Blvd. site, was correct.

#### PARTIES IN INTEREST:

Vern Dahl  
General Manager, Gasoline Operations  
by: Attorney Charles H. Constantine  
Constantine, Christensen & Krohn, S.C.  
Attorneys at Law 723 Main Street  
P.O. Box 1823  
Racine, WI 53401-1823

Department of Industry, Labor and Human Relations  
210 East Washington Avenue  
P.O. Box 7946  
Madison WI 53707-7946  
by: Joyce Howe  
Disputed Claims Coordinator

#### FINDINGS OF FACT

1. Appellant Vern Dahl is the general manager of gasoline operations for Open Pantry Food Marts of Wisconsin, Inc., which owns the property located at 605 W. Lapham Blvd., Milwaukee, Wisconsin, which was the subject of PECFA claim #53204-3421-05.
2. In October 1989 Open Pantry arranged to have three underground storage tanks (UST) removed from the Lapham Blvd. property pursuant to a bid totalling \$13,434.30. The contractor (Uni-Pump) proposed to remove the concrete above the tanks, remove and dispose of the tanks and piping, backfill the excavation with pea gravel and cover the area with new concrete. Later, Open Pantry paid a bill for tank removal work in the amount of \$13,434.30. In October 1993 Open Pantry submitted a claim for reimbursement of the costs it incurred in cleaning up the Lapham Blvd. property to the Department of Industry, Labor and Human Relations. That claim did not include a majority of the tank removal costs.
3. In October 1994 Open Pantry submitted a claim for reimbursement of \$13,434.30, less \$615.86

that it stated had been included in the 1993 claim, to the Department. This claim was denied in its entirety by the Department on October 18, 1994. The appellant filed a timely appeal on November 8, 1994.

4. Open Pantry is not able to provide itemized documentation of the amounts charged by the contractor in removing the underground storage tanks from the Lapham Blvd. property because the contractor lost those records.

5. In October 1989 Open Pantry was billed \$6500 for removal and disposal of seven underground storage tanks and piping located at 3425 W. Silver Springs Dr. in Milwaukee.

6. In February 1989 Open Pantry accepted a bid, from the same contractor (Uni-Pump) that performed the work on the Lapham Blvd. property, in the amount of \$9875, for the excavation, removal and disposal of five underground storage tanks, backfilling with pea gravel and concrete replacement for its property located at 1627 Washington Ave., Racine, Wisconsin. In October 1989 Open Pantry was billed and, it later paid that contractor, \$9875 for the removal and disposal of three tanks at the Washington Ave. property "per our quote".

7. An estimator for Uni-Pump explained that the tank removal work at Lapham Blvd. had been subcontracted to Interstate Pump and Tank, Inc., which, in 1989, had been affiliated with Uni-Pump. Using the proposal, which was the only document available, the estimator provided a breakdown of the approximate 1989 costs for performing an estimate of the work in question, including charges for possible miscellaneous amounts, that equalled the amount paid by Open Pantry for the tank removal work.

## DISCUSSION

Section 101.143(3)(f) of the statutes provides:

(f) Application. A claimant shall submit a claim on a form provided by the department. The claim shall contain all of the following documentation of activities, plans and expenditures associated with the eligible costs incurred because of a petroleum product's discharge from a petroleum product storage system:

1. A record of investigation results and data interpretation.
2. A remedial action plan.
3. Contracts for eligible costs incurred because of the discharge and records of contract negotiations.
4. Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge.
5. The written approval of the department of natural resources under par. (c)4.
6. Other records and statements that the department determines to be necessary to complete the application.

Open Pantry contends that the PECFA program should honor its request for reimbursement of the amounts it paid for underground storage tank removal at its Lapham Blvd. property, despite its inability to provide detailed records to substantiate that any particular item that contributed to the amount it paid would meet the eligibility requirements for reimbursement from the PECFA program. It further contends that because the legislation involved permits the department to establish a schedule of what the department considers the customary costs are for certain items and would permit the department to use that schedule to determine the amounts eligible for reimbursement, that the claimant is not required to provide specific itemization. It contends that its evidence of similar costs incurred in tank removal on several of its other properties, plus the estimates it provided of the costs for individual portions of the work performed at the Lapham Blvd. site, are sufficient to establish its entitlement to reimbursement of at least \$6278. Its contentions cannot be sustained. The department has not established the schedule referred to by the appellant. Instead, the department has consistently required an itemized breakdown of work performed to document actual costs incurred so that the department can determine whether each item and/or, whether any portion of each item, meets the program's eligibility requirements. That specificity is absent from the claim submitted by Open Pantry.

#### CONCLUSIONS OF LAW

1. The appellant has not provided adequate documentation to establish the actual costs it incurred that would be eligible for reimbursement pursuant to section 101.143(3)(f) of the statutes.

#### PROPOSED DECISION

The department's decision denying reimbursement to the appellant is affirmed. Accordingly, the appellant's request for additional reimbursement from the Petroleum Environmental Cleanup Fund for its site located at 605 W. Lapham Blvd., Milwaukee, Wisconsin, is denied.

#### HEARING EXAMINER

Ronald I. Weisbrod  
Administrative Law Judge

PECFA 95-26A/riw